

In The United States District Court
For The Southern District Of Ohio

Marvellous Keene,)	Case No. 1:00-CV-421
)	
Petitioner,)	Judge Beckwith
)	
vs.)	Magistrate Judge Merz
)	
Betty Mitchell, Warden)	<i>Death Penalty Case</i>
)	
Respondent.)	

**Appellant Keene's Reply To
Appellee's Opposition To Keene's Rule 60(b) Motion**

The Warden argues, in response to Marvellous Keene's Rule 60(b) motion, that this Court lacks jurisdiction to rule on this motion. The Warden's argument is incorrect.

Sixth Circuit case law establishes that, even after a notice of appeal in an action is filed in the Sixth Circuit Court, a federal district court nonetheless possesses the authority to entertain a Rule 60(b) motion. First Nat'l Bank of Salem v. Hirsch, 535 F.2d 343, 345 (6th Cir. 1976); Herring v. Kennedy-Herring Hardware Co., 261 F.2d 202, 203-04 (6th Cir. 1958). First Nat'l Bank and Herring delineate the proper procedure in this circumstance: the Rule 60(b) motion to vacate judgment is properly filed in the district court, and a motion seeking in effect to remand the case is properly filed in the court of appeals.

In First Nat'l Bank, after a notice of appeal had been filed, the Sixth Circuit held:

In accordance with this procedure, we think that the party seeking to file a Rule 60(b) motion (NBD) should have filed that motion in the district court. If the district judge is disposed to grant the motion, he may enter an order so indicating and the party may then file a motion to remand in this court.

Id. at 346 (footnote omitted). While Keene's Rule 60(b) motion does not deal with newly discovered evidence, that does not materially distinguish it from First Nat'l Bank.

This Court has jurisdiction to consider Keene's Rule 60(b). This Court should reject the Warden's argument and consider the merits of Keene's motion.

Respectfully submitted,

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s/ Kelly L. Culshaw

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